violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated." (Appendix E.)

By Notice of Appeal dated and served October 6, 1959, and thereafter filed in the office of the County Clerk of Albany County, New York, petitioners appealed to this court.

3. Statutory Basis for Jurisdiction.

The Jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Section 1257(2).

4. Cases Sustaining Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court to review the orders appealed from on direct appeal:

Attorney General of the State of Michigan v. *Lowrey*, 199 U. S. 233, 26 S. Ct. 27, 50 L. Ed. 167;

Myles Salt Co. v. *Board of Commissioners*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392;

Hunter v. *Pittsburgh*, 207 U. S. 178, 28 S. Ct. 46, 52 L. Ed. 159.

5. Statutes in Issue.

Set forth in Appendix F annexed hereto are the texts of the following New York statutes whose validity is challenged on this appeal:

New York Education Law, Sections 1801(1), 1801(2), 1804(5), 1805.

New York Civil Practice Act, Section 1291.

C. Questions Presented.

The following questions are presented by this appeal:

(1) Do the centralization provisions of the New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by permitting the Commissioner of Education to combine appellants' School District with two other School Districts, thereby depriving appellants' of the benefits they sought to achieve through the investment of substantial sums of borrowed money in their school, but at the same time requiring appellants to continue to carry, and, eventually, fully to discharge the existing bonded indebtedness of appellants' school district?

(2) Do the centralization provisions of New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to set forth standards adequate to guide the Commissioner of Education in exercising the administrative power granted to him thereunder?

(3) Does the action of the Commissioner of Education of the State of New York, an administrative officer, violate the Fourteenth Amendment to the Constitution of the United States, by including appellants' School District in a larger district against the express opposition of the majority of the taxpayers in appellants' district, without a hearing of any sort, without making any findings of fact, and without disclosing to the appellants the grounds upon which his administrative determination rested?

(4) Do the provisions of New York State Education Law (Section 1801, *et seq.*), together with Article 78 of

the New York Civil Practice Act as applied by the courts below, deprive appellants of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that they impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests?

(5) Have the appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their having been in this proceeding denied a hearing upon the issues of fact raised by the pleadings?

D. Statement of Case.

1. Facts.

The proposed Central School District is made up of three Union Free School Districts; Union Free School District No. 3, (hereinafter referred to as "Brookville"), which is one of the petitioners herein, Union Free School District No. 4, (hereinafter referred to as "Locust Valley"), and Union Free School District No. 6, (hereinafter referred to as "Bayville") (80). These three districts are located in the Town of Oyster Bay, Nassau County, Long Island; Bayville is situated north and east of Locust Valley, which in turn is north of Brookville. Unlike the more densely populated Bayville and Locust Valley Districts (86-91) Brookville is an entirely residential community completely zoned for two acre, single-family residences (81): It has no shopping areas, manufacturing districts, nor centers of population (81). Its assessed valuation of $10,800,000 exceeds Bayville's by approximately two and one-half million dollars, and is slightly less than one-half that of Locust Valley's (82-83).

Brookville has a unique educational problem in that very few of its students attend public high school (87, 91). On the other hand, a large proportion of its children attend the Brookville Grammar School, which provides the highest quality instruction (85-7). Its curriculum is tailor-made for the special needs of the children of Brookville (92). Even though it is a grammar school, it provides for special instruction in such subjects as Latin, home economics, and industrial arts (84). Its facilities are completely adequate for its current and future needs (83-8, 92). Since no more than twenty-five of its high school age students have ever been enrolled in public schools at the same time, Brookville evidently has no need for a high school of its own (91-92). Brookville's taxpayers have supported it in spending large sums of money in order to provide the finest possible education for their children and in order to adapt that education to the special needs of those children. In this endeavor they have incurred a bonded indebtedness of approximately $495,000 (97) which amounts to more than $1,000 per qualified voter (252). By way of contrast, the "per voter" indebtedness in Bayville is approximately $230 and in Locust Valley is only slightly over $12! (97, 253-5).

By far the greatest proportion of the Brookville tax dollar is spent for the grammar school education of the children of the district. In a centralized district where Bayville and Locust Valley, with their large numbers of public high school students, will easily outvote Brookville, the situation clearly will change so that the bulk of the tax dollar would be spent for the construction, operation and maintenance of a new high school which will be of virtually no use to the Brookville children. Moreover, after centralization, the bonded indebtedness which the Brookville taxpayers have already incurred would not be

merged into the total indebtedness of the new district, but would remain a charge upon the taxpayers of the Brookville District (98, 239).

Thus, not only would Brookville be required to pay off the debts which they have already incurred in order to provide a superior, specialized, grammar school education for their children, which inevitably would be watered down once it fell under the control of Bayville and Locust Valley (85-6), but also Brookville taxpayers would have to assume the additional burden of bearing approximately 1/4th the cost of constructing a new high school which few of their children would use, as well as 1/4th the maintenance and operating costs of the new school district, even though their children would constitute only 1/10th of the total school population (82-83, 86-91). In short, the proposed centralization will very likely result in a deterioration of the quality and usefulness of the education which the Brookville children will receive; it will provide virtually no benefit to the Brookville District; and all this will be at a tremendous increase in cost to the taxpayers of the district.

A clue to the real reason behind the desire of Locust Valley and Bayville and of the Commissioner to include Brookville in the central school district is provided by a comparison of the tax rates. For the first year following the proposed centralization, Bayville's tax rate would drop 31¢ per hundred dollars of assessed valuation; Locust Valley's would increase by 5¢; whereas Brookville's would increase by 47¢ (105-6). After construction of the $1,700,000 high school which the Commissioner apparently deems necessary (210, 178-80), but which would be used by a "small and insignificant" number of Brookville students (110-111, 233-4), the tax rate would further increase. With respect to the cost of educating high school students, Bay-

ville's cost as a result of centralization would decrease by $366 per pupil, Locust Valley's would be increased by $59 per pupil, but Brookville's would be increased by $2,000 per pupil (106-7). Clearly, Bayville and Locust Valley want Brookville in this proposed centralization only so that Brookville can help finance the education of Bayville's and Locust Valley's children.

Before laying out the Central School District, the Commissioner was aware that the majority of qualified voters in Bayville and Locust Valley favored the proposal, but that Brookville was virtually unanimous in its opposition (252-5, 259-64, 271-3). Nevertheless, and notwithstanding the manifest inequity imposed upon the Brookville taxpayers, the Commissioner proceeded to lay out a central school district which included not only Locust Valley and Bayville, which need a pubilc high school, but also Brookville, which has no such need.

At the very threshold of this appeal, it is of the utmost importance that the Court take cognizance of how this litigation evolved, for it is only in the context of the Commissioner's actions, pleadings, and procedures that the broad significance of the precise issues can be perceived.

There is only one procedure provided by the law of New York to review such a determination by appellee Commissioner of Education (hereinafter called the "Commissioner") to centralize school districts—Article 78 of the Civil Practice Act. A proceeding thereunder is commenced by the service of a petition in which the persons aggrieved by an administrative decision set forth the grounds for their grievances. The gravamen of such a petition is that the administrator acted arbitrarily, unreasonably, and capriciously.

Since the centralization statute (Education Law, Section 1801) requires neither a hearing, the taking of evidence,

nor a decision by the Commissioner, the only act which could be reviewed here was the centralization order itself. Consequently, when drawing their petition, appellants had no knowledge of the grounds upon which the Commissioner's determination rested. Moreover, as a practical matter, such a petition had to be served within a very short time after the publication of the administrator's order. If not, any grievance which the petitioners might have had would not have been heard, for under the rule of *Bramley v. Miller*, 270 N. Y. 307, unless timely objection is made prior to the election, such objections and grievances as the petitioners may possess become academic.

The next step under the statute is that the administrator must serve an answer in which he "*must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of.*" (Emphasis supplied; C. P. A. 1291).

What happened in the instant case? The administrator served an answer in which he admitted certain allegations of the petition, and denied others, thereby raising issues of fact with respect to the arbitrariness and unreasonableness of his actions.

Moreover, he neither admitted, nor denied, twenty paragraphs containing specific allegations of fact concerning the Brookville School District. Instead he referred the court to certain "studies for their contents and legal effect" (236, 245). Neither meaning, nor legal effect, can be attributed to such a statement in a pleading. In addition, the respondent-administrator alleged in his answer that these "studies" were "returned herewith and made a part hereof" (251, 257).

Even more significant is what the administrator did *not* do in his answer. He utterly failed to say on what he relied when he decreed centralization. Nowhere did he

allege that these "studies" were accurate, nor that he considered them, nor that he was aware of them, nor that he relied upon them in reaching his determination. In the absence of such allegations, or any one of them, both the statement of the Commissioner and the "studies" themselves are incompetent and were improperly before the court. Beyond that, examination of these "studies" reveals that on their face they are inaccurate, incomplete, and misleading.

How could these incompetent, hearsay, self-serving, inaccurate, misleading, and incomplete documents be deemed compliance with the direction of Section 1291 of the Civil Practice Act, namely, that respondent's answer "*must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of*"? (Emphasis supplied.)

In seeking to compel the respondent to comply with the Civil Practice Act and to allege in his answer the basis for his determination, petitioners have not been simply insisting on technicalities having no relation to the merits of the proceeding. Since petitioners have not been apprised of the precise basis for the administrator's determination here, they have been wholly unable to attack that determination on any specific factual ground. An administrator may act only in accordance with the statute which grants him his power. Moreover, he may act only within the standards laid down by that statute. Petitioners here have claimed that the respondent did not follow the statutory standards and that he adopted standards not prescribed by the Legislature. In this context, it becomes of the utmost importance to the court and to petitioners that the respondent carefully comply with the statute and apprise all concerned of the basis for his determination, for as the New

York Court of Appeals said, in *Barry* v. *O'Connell*, 303 N. Y. 46, 53:

> "It will not do for a court to be compelled to guess at the theory underlying the [administrator's] action, nor can a court be expected to chisel that which must be precise from what the [administrator] has left vague and indecisive."

In spite of the Commissioner's failure to tell the court the basis for his determination, and notwithstanding the foregoing arguments raised by petitioners, the three Courts below have held on this record that petitioners are entitled neither to further information, nor to a hearing with respect to the centralization order. Should these lower court determinations be upheld, petitioners will have been subjected to the far reaching consequences of centralization, without their ever having learned the basis for the administrator's determination and without ever having been given an opportunity to disprove the facts underlying that determination, whatever those facts may be.

As long as an administrator may refuse to reveal the grounds of his determination, equally as long will parties aggrieved thereby be effectively denied their day in court. Such a result is unjust and violative of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

2. How Constitutional Issues Were Raised and Disposed of Below.

A. The first issue, stated in full as point C-1 above, (p. 5), is the unconstitutionality of requiring the taxpayer-petitioners to continue to pay off the bonded indebtedness on the Brookville School even after centralization.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petition pars. 38-42 (96-99).

(2) Petition Par. 60 (112-113).

(3) Petitioners' Memorandum, Point III (pp. 21-24).

(b) Disposed of:

(1) Judge Schirick's decision:

"The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District* v. *Wilson*, 303 N. Y. 107). Despite petitioners' arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question" (58-9).

(2) Judge Schirick's order dismissed the petition thereby rejecting petitioners' argument (45-6).

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-b, pp. 14-18.

(3) Petitioners' Brief, p. 42.

(4) Oral argument.

(b) Disposed of:

(1) In opinion of Appellate Division (387-393), the court purported to dispose of this argument but it missed the point of petitioners' being required to pay its bonded indebtedness even after centralization.

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition thereby rejecting petitioners' argument (361-370).

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, Point III-A, pp. 33-7.

(2) Oral argument.

(b) Disposed of:

(1) No majority opinion; not covered in dissenting opinion.

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

(3) Court granted amendment of *remittitur*.

B. The second issue stated in full as Point C-2 above, (p. 5), is whether the centralization statute is unconstitutional for failure to set forth adequate standards to guide the Commissioner in making his administrative determination.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petition Par. 59 (111-112).

(2) Petitioners' memorandum, Point II (pp. 17-20).

(b) Disposed of:

(1) Judge Schirick's decision:

"The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District v. Wilson*, 303 N. Y. 107). Despite petitioners'

arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question" (58-9).

(2) Judge Schirick's order dismissed the petition thereby rejecting petitioners' argument (45-6).

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-A, pp. 9-14.

(3) Petitioners' Brief, p. 42.

(4) Oral argument.

(b) Disposed of:

(1) Appellate Division opinion (393-401):

"To the extent the question of 'standards' may be thought to have been left open after *Ginther* and in *Wilson*, we are of opinion that the statute is not invalid for a failure of prescription of more detailed standards for the guidance of the administrative action of the Commissioner than those in his broad grant of power in matters of education" (401).

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition, thereby rejecting petitioners' argument (361-370).

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, Point III-B, pp. 40-42.

(b) Disposed of:

(1) No majority opinion; not discussed in dissent.

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

(3) Court granted amendment of *remittitur*.

C. The third, fourth and fifth issues stated in full at point C-3, C-4 and C-5 above (pp. 5, 6), can be grouped together as presenting a question of procedural due process. Stated generally, petitioners here contend that although their educational system has been disrupted and their tax burden greatly increased, there has never been a hearing on disputed facts, they have never been told the reasons for centralization, and they have effectively been prevented from controverting whatever assumptions may have given rise to the Commissioner's action.

1. In Supreme Court, Albany County:

(a) Raised:

(1) Petitioners' reply to respondent's answer (277-8).

(2) Petitioners' demand for jury trial (281-2).

(3) Preliminary memorandum on motion to dismiss petition, Point I, pp. 6-9.

(4) Memorandum on motion, Point I, pp. 14-16.

(b) Disposed of:

(1) Judge Schirick's decision:

"On June 27 this court rendered a second preliminary decision to the effect that *no issues of fact were presented* which should be tried by a jury.

In the opinion of the court issues of law alone are here presented" (57-8). (Emphasis supplied.)

(Judge Schirick did not discuss the other aspects of the procedural issues which had been presented to him).

(2) Order dismissed petition on the merits (45-6) and vacated petitioners' demand for a jury trial (44-5), thereby rejecting petitioners' argument.

2. In Appellate Division, Second Department:

(a) Raised:

(1) Petitioners' Brief, p. 8.

(2) Petitioners' Brief, Point I-B, pp. 18-21.

(3) Petitioners' Brief, p. 23.

(4) Petitioners' Brief, Point III, pp. 25-32.

(5) Petitioners' Brief, pp. 42-3.

(6) Oral argument.

(b) Disposed of:

(1) Opinion of Appellate Division (410-411) disposes of a part this argument, viz. the legal sufficiency of the Commissioner's answer. The remainder of this issue was not discussed by the Appellate Division.

(2) Order of Appellate Division affirmed Judge Schirick's dismissal of the petition, thereby rejecting petitioners' argument.

3. In Court of Appeals:

(a) Raised:

(1) Petitioners' Brief, pp. 15-16, items 1, 2 and 8; Point I-A, pp. 18-21; Point III-A, pp. 38-40.

(2) Oral argument.

(b) Disposed of:

(1) No majority opinion; but see dissenting opinion of Froessel, J. annexed hereto as Appendix "A".

(2) Order affirmed Appellate Division, thereby rejecting petitioners' argument.

E. Substantial Questions are Presented.

The five issues presented by the Notice of Appeal and by paragraphs C(1) to C(5) of this jurisdictional statement are, for purposes of this exposition of their substantiality, condensed into three issues, namely:

(1) Do the centralization provisions of the New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by permitting the Commissioner of Education to combine appellants' School District with two other School Districts, thereby depriving appellants of the benefits they sought to achieve through the investment of substantial sums of borrowed money in their school, but at the same time requiring appellant to continue to carry, and, eventually, fully to discharge the existing bonded indebtedness of appellants' School District?

(2) Do the centralization provisions of New York State Education Law (Section 1801, *et seq.*), violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to set forth standards adequate to guide the Commissioner of Education in exercising the administrative power granted to him thereunder?

(3) Have appellants been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by reason of their being deprived in this proceeding of a hearing upon the issues of fact raised by the pleadings in that the Commissioner ordered centralization without a hearing of any sort, without making any findings of fact, and without otherwise revealing to petitioners the facts upon which his determination rested, and in that the statutes in question

as applied in this proceeding impose a tax upon the individual appellants but at the same time prohibit them from controverting assumptions of fact on which that tax rests.

1. The first issue raised is one of substantive due process of law.

In a similar case (*Attorney General of the State of Michigan* v. *Lowrey*, 199 U. S. 233, 26 S. Ct. 27, 50 L. Ed. 167) this Court held constitutional a Michigan statute calling for the centralization of school districts. There, however, the Michigan statute required the new central district to assume and pay the debts of each of the component districts. As this Court expressly noted in its opinion:

> "The act gave to the new district the property within its limits which had belonged to the districts from which it was created, *and required the new district to assume and pay the debts and obligations of the old districts . . .*" (emphasis supplied; 199 U. S. 233 at pp. 237-8).

Not decided in that case was the important question of whether a state may constitutionally combine existing districts into a new central district, and at the same time require the component districts separately to discharge their bonded indebtedness. That issue is squarely presented by this appeal.

In order to provide a superior educational program tailored to the needs of their children, petitioners have incurred a bonded indebtedness of nearly half a million dollars. In effect, this means that each qualified voter in the Brookville District assumed an obligation of over $1,000. This obligation with the interest thereon was to be liquidated over a period of years with moneys to be obtained from self imposed taxation. The sacrifice which the Brookville taxpayers thus imposed upon themselves was made in

order to provide for their children the unique educational advantages afforded by their operation of the Brookville District.

Then the Commissioner, purporting to act under New York Education Law, Section 1801, *et seq.*, by decree, combined Brookville with Locust Valley and Bayville into a single central school district. Under the statute the central school district takes over the operation and control of the Brookville School, thereby depriving petitioners of the unique advantages they had achieved, without granting to them any corresponding benefits. This in itself is unconstitutional. *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392.

Moreover, petitioners' bonded indebtedness *remains* an obligation of the taxpayers of the Brookville District which must be discharged in accordance with the original terms of the bond issue. Thus, while the Brookville taxpayers are deprived by centralization of the benefits which they sought to obtain through their extensive building program, they must nevertheless continue, after centralization, to bear the financial burden of that program and pay off in full their bonded indebtedness.

The constitutional issue thus presented—the issue which was left open in *Attorney General of the State of Michigan* v. *Lowrey*, *supra*—is substantial and should be decided by this Court.

2. The second issue presented is whether the New York Education Law, Section 1801, *et seq.*, is unconstitutional for the reason that it fails to set forth adequate standards to guide the Commissioner in making his determination for centralization.

The Legislature has prescribed two such standards. The Commissioner shall include territory: (a) of suitable size conveniently located for the attendance of pupils, and (b)

having a sufficient number of pupils for the establishment of a central school.

Petitioners contend these standards are so inadequate that even if the Commissioner had operated within their limits (which he conceded he did not) his determination would not have been based upon facts sufficient to justify to any reasonable man this centralization with its resultant tax burdens upon the petitioners.

Just as the Legislature may not arbitrarily fix the measure of a tax by a fiction (see: *Hooper* v. *Tax Commission*, 284 U. S. 206; *Matter of Vanderbilt*, 281 N. Y. 297, 314) neither may petitioners' tax burden be increased by a statute having grossly inadequate standards which by common sense cannot be, and by the Commissioner's own admission* were not, the basis for the action taken in this case.

The patent inadequacy of these standards is revealed by the following:

(a) A reading of the statute itself. There is no mention in the statute of the factors which are universally conceded to be the real basis for centralization, viz., the educational needs, available wealth, social and economic status of the area, school building facilities, and the effect upon the tax rate.

(b) Even the Commissioner was forced to turn from the statute to other standards in order to make his determination.

(c) The Legislature itself, in its own Master Plan for Education, set forth many other standards and guides for centralization, but it neglected to include those standards in the statute (see dissenting opinion of Froessel, J. in the Court of Appeals, Appendix A annexed hereto).

* Brief in Appellate Division, pp. 15-17.

A statute such as this which is inadequate and essentially unrelated to the purpose for which enacted should be stricken.

3. The third issue presented is one of procedural due process.

As this Court noted in *Securities Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, at p. 196:

> "... A reviewing court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis".

Of course, if the Court is to review administrative action "solely on the grounds invoked by the agency", it must be informed as to what those grounds are. As Judge Lewis of the New York Court of Appeals wrote in *Matter of Barry* v. *O'Connell*, 303 N. Y. 46, at pp. 51-52:

> "* * * the lack of a statement of the factual basis for the determination not only burdens the applicant in preparing his challenge to the determination, but also impedes the Court in its review of that determination. 'If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, we must know what a decision means before the duty becomes ours to say whether it is right or wrong.' (citations)"

Just as the Court must be apprised of the facts underlying an administrator's determination before it can review that determination, so must the petitioners here be apprised of the facts underlying the Commissioner's determination to centralize before they may effectively controvert that determination and forestall the increased tax burden which inevitably follows therefrom.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 20, this Court held:

> "* * * a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

The record is replete with facts demonstrating the effect of the Commissioner's order of centralization upon the taxes which Brookville will be forced to pay. It will impose additional tax burdens in order to finance the educational costs of Bayville and Locust Valley; for not only must petitioners pay off their old bonded indebtedness without help from Bayville or Locust Valley, but they must also assume part of the burden of the existing educational costs of those districts as well as the costs of building additional facilities which are required by Bayville and Locust Valley but which petitioners do not need. All this follows without the benefit of a fair hearing whereat petitioners could controvert the basis for the Commissioner's order of centralization. Thus, what was condemned in *Schlesinger* v. *Wisconsin* and the *Vanderbilt* case has here been condoned.

Petitioner's taxes have been substantially increased based upon assumptions of fact which the Commissioner has kept concealed despite petitioners' efforts to compel their disclosure. Without such disclosure, petitioners are effectively forbidden to controvert the Commissioner's basis

for centralization. As already noted, a statute which permits this procedure is "so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment."

Judge Froessel, in his dissenting opinion below, revealed the importance of this right of review under the circumstances of this case, when he wrote:

> "The taxpayers (some of whom are parties here) of the appellant school district will be required by the order of centralization to make substantial contributions—because of the district's assessed valuation—to the construction of a high school for the principal benefit of the citizens of the two other districts (since very few of their own children attend public high school), while at the same time they will continue to be responsible for paying off—unassisted—a bonded indebtedness of almost a half million dollars. Surely the district and its taxpayers are entitled to know the justification for this burden in plainer terms than offered in the conclusory statements of the respondent. The court, too, is entitled to know the *factual* basis for the respondent's determination. Otherwise the review for arbitrariness provided for in an Article 78 proceeding such as this is made utterly meaningless." (Appendix A.)

F. Conclusion.

Jurisdiction of the appeal should be upheld and the case set down for argument.

Respectfully submitted,

JOHN W. BURKE,
Appellants' Counsel of Record in the
Supreme Court of the United States.

SPRAGUE AND STERN,
Attorneys for Appellants.

APPENDIX A.

Dissenting Opinion of Hon. Charles W. Froessel.

STATE OF NEW YORK.

COURT OF APPEALS

IN THE MATTER *of* The Applications of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., Appellants, For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, &c., Respondent.	No. 393.

FROESSEL, J.: (dissenting)

I dissent and vote to reverse and remit the matter to Special Term for a trial of the issues of fact raised by the pleadings and exhibits attached thereto. Whether the order of centralization was arbitrary and capricious and failed to comply with the terms of the enabling statute (Education Law, §1801, subd. 2) may not be decided on the record presently before us (Civil Practice Act, §1295; *Matter of Mandle* v. *Brown*, 5 N. Y. 2d 51, 65).

I note at the outset that we are not dealing here with the provisions of section 310 of the Education Law ren-

dering certain determinations of the commissioner of education "final and conclusive" (*cf. Matter of Board of Education* v. *Allen*, decided May 28, 1959). These provisions have no application to the commissioner's order laying out a central school district under Article 37.

In *Matter of Bethlehem Union Free School* v. *Wilson*, 303 N. Y. 107, we held that the commissioner's order of centralization was not arbitrary and capricious. There was no trial of issues of fact in that case, since the record before us revealed sufficient justification for the order. The commissioner there placed particular reliance on the fact that the so-called Master Plan for School District Reorganization had recommended the organization of a central school district along virtually the same lines as the commissioner's order. (Report of Joint Legislative Committee on the State Educational System, N. Y. Legis. Doc., 1947, No. 25, p. 22; see, *e.g.*, Record on Appeal in *Bethlehem* case, ff. 277-9, Resp. Br. pp. 14-15). Thirteen of the 18 school districts recommended by the Master Plan for containment in the centralized district were included in the commissioner's centralization order.

In sustaining the order in that case, Special Term wrote (196 Misc. at 244):

> "considerable research and investigation were done by that committee, numerous hearings which were attended by interested persons were held in various parts of the State and the result evolved was such master plan [see p. 16 of Committee Report, *supra*]. While the commissioner was not required to abide by the findings of that committee, it impresses me that his adoption of its plan in laying out the central school district involved here is a very cogent argument against caprice and arbitrary action on his part."

Our court in its opinion (p. 115) was similarly impressed with the fact that the commissioner had followed the Master Plan, stating this as the *first* in a list of circumstances

demonstrating the reasonableness of the commissioner's determination.

The answer of the commissioner in the instant case and the exhibits thereto attached contain no such supporting factual material. The answer by way of defense simply states very generally the powers of the commissioner under the Education Law (pars. 17th and 19th), repeats the language of §1801(2) giving him the power to order centralization (par. 18th), alleges that his action was not arbitrary (par. 20th), and, finally, that "Returned herewith and made a part hereof are the following exhibits:" (1) petition signed by 419 of the 463 qualified voters in appellant District No. 3 (Brookville) objecting to the inclusion of such district in the centralization; (2) petitions of voters of the other two districts requesting centralization; (3) the order laying out the central school district; (4) "Studies made by respondent" in laying out the district.

The "studies" referred to in the answer, at least in part the products of a so-called study group of representatives of the Locust Valley and Bayside districts which met in Albany on September 13th to 14th, 1956, consisted of the following:

1. A financial plan with estimated expenditures including the payments of principal and interest on a $1,700,000 bond issue (for the construction of a junior-senior high school), which plan contained the qualification *"that the estimates contained in this study are based on many variables, changes in any one of which may materially alter the validity of the estimates made."*

2. An admittedly *tentative* transportation cost survey with a strong recommendation "that a *detailed survey be made after centralization* * * *."

3. An instructional program planning sheet and projected estimates of the number of pupils anticipated for the future elementary and secondary program *but with no breakdown whatever* as to the number of pupils

from the *Brookville district* who would attend the secondary schools." (Emphasis supplied.)

The final "study" was a memorandum dated March 14, 1957, from the Chief of the Bureau of Rural Administrative Services to the Assistant Commissioner recommending approval of the establishment of a central school district. This memorandum included the following statements:

"MASTER PLAN

The Master Plan approved a centralization for the Oyster Bay area. This proposal involves about half of the original area. Post-war growth in Nassau County has made it advisable to alter the recommendations for this area.

* * * * * *

STUDIES

The matter of centralization has been under consideration in this area for several years. Recommendations for reorganization were made by the Nassau County School Study Committee in 1951 [not otherwise identified, referred to, quoted from or described]. The Department study was undertaken in September, 1956.

PETITIONS AND SURVEYS

[Statement that there was strong support for the centralization in Locust Valley and Bayville and strong opposition in Brookville] * * * *The Brookville district appears to be a reasonable part of the area of the proposal. There appears to be no valid reason why Brookville should not be included with Locust Valley and Bayville in an area suitable for the organization of a central school district.*" (Emphasis supplied.)

The statement in this recommendation, which was approved and became the basis for the commissioner's

order, purporting to rely in part upon a recommendation in the Master Plan, is *totally unsupported* by an examination of that document. Indeed, the Plan expressly declares at page 467 of the aforesaid Joint Legislative Committee Report that the three union free school districts here involved were among those districts "LEFT FOR FURTHER STUDY AND FUTURE DETERMINATION". It is noteworthy that no mention whatever is made of the Master Plan in the commissioner's brief in this court. This is in marked contrast to the *Bethlehem* case, *supra*, where the commissioner placed great reliance, as did the court in sustaining him, on the recommendation of the Master Plan.

In making their determination, the draftsmen of the *Legislative* Plan, who spent four years in its creation, considered the following factors as significant (Committee Report, *supra*, p. 15):

"1. The educational needs of each area.

   a. The number of pupils to be educated.

   b. The kind of education to be provided.

2. The amount of wealth available for tax purposes for the support of an educational program in terms of need.

3. The school transportation program.

   a. The topography of each area.

   b. The location of highways.

   c. The kind of transportation facilities available.

   d. The time element in the transportation of school children.

4. The social and economic status of each area.

5. The school building facilities.

   a. The maximum use of the present school buildings.

b. The minimum building program in future organization.

6. The problems peculiar to each area."

What indication is there in the instant case that the commissioner has adequately considered all of these factors? Surely the court should not be content with the mere assertion in his brief that

> "the Commissioner as usual has used meticulous care in the preparation for his final issuance of the order * * *",

and the erroneous statement that since "Special Term and the Appellate Division have been unanimous in upholding the Commissioner of Education's order", "It would seem, therefore, that this issue is not before this Court".

The taxpayers [some of whom are parties here] of the appellant school district will be required by the order of centralization to make substantial contributions—because of the district's assessed valuation—to the construction of a high school for the principal benefit of the citizens of the two other districts (since very few of their own children attend public high school), while at the same time they will continue to be responsible for paying off—unassisted—a bonded indebtedness of almost a half million dollars. Surely the district and its taxpayers are entitled to know the justification for this burden in plainer terms than offered in the conclusory statements of the respondent. The court, too, is entitled to know the *factual* basis for the respondent's determination. Otherwise the review for arbitrariness provided for in an Article 78 proceeding such as this is made utterly meaningless.

The order appealed from should be reversed and the matter remitted to Special Term for further proceedings.

* * * * * *

Order affirmed, without costs. No opinion. All concur except Froessel, J., who dissents in an opinion in which Van Voorhis, J., concurs.

APPENDIX B.

Opinion of the Supreme Court of the State of New York, Appellate Division, Third Department.

Petitioners, who comprise both the Board of Education and also certain taxpayers, of a union school district seek to annul an order of the State Commissioner of Education laying out a new central school district. The district in which petitioners have an interest would be embraced in the new central district. The court at Special Term has in part sustained and in part annulled the order of the Commissioner. There are cross-appeals.

The central school district laid down by the order of the Commissioner is in the Town of Oyster Bay, Nassau County. It would bring in three existing union free districts, which for convenience will be called Brookville (District 3); Locust Valley (District 4); and Bayville (District 6). It is not in dispute that the main aim in setting up the proposed central district by the Commissioner's order is to provide facilities for secondary education.

The record makes it clear that public sentiment is in favor of the establishment of the central district in Locust Valley and Bayville; but in the Brookville district represented by petitioners, public sentiment is very strongly against its establishment. The voting ratios in Locust Valley and Bayville are such, however, that it is manifest that upon submission of the order setting up the central district for approval, Brookville will be swept into the new district against its manifest preference.

The reasons which underlie the opposition of Brookville to the centralized school process are readily demonstrable. Brookville is a school district of relatively large wealth per capita; it has spent and committed itself to pay bond issues to provide unusually good primary education for its children at considerable greater cost per pupil than the expenditures made by the other districts; and nearly all of its children will go from this excellent primary school.

not to any public high school, but to private secondary schools.

The Brookville district feels, therefore, that it has no substantial need for high school facilities for its own pupils; and that being included with its two neighboring districts, which concededly need high school facilities, will merely increase unduly its tax burden without substantial benefit to itself or the needs of its children. For these reasons, among others, petitioners contend that the order of the Commissioner including Brookville within the central district is arbitrary and unreasonable.

It is argued, additionally, that the Commissioner did not follow the statute in determining that the order creating the central district should be made; and the individual petitioners allege that in any event the statute is unconstitutional and the Commissioner's order purported to be in pursuance of the statute in its tax impact on them is in violation of their individual rights.

We address ourselves first to the constitutional problem as it is posed by petitioners in its broadest reach: that any legislative or administrative scheme which permits a tax district to be cast in with another and larger district against its will and under circumstances where, in the pooled fiscal apparatus of the larger district, it will surely lose the autonomy and right of fiscal decision it has heretofore exercised, is a deprivation of the right of self-determination by the public tax district and does violence to the constitutional rights of its taxpayers.

Indeed, it is argued by the individual petitioners that in the increased tax burden imposed by this scheme they are deprived of due process of law. The literal argument advanced in petitioners' brief is that the order of the Commissioner "discriminates against them in that their tax burden will be increased to pay for the education of children of the other two districts without corresponding benefit to them, and in that the statutory procedure virtually deprives them of any right of self-determination with respect to their educational system". A statute, it is argued which "thus penalizes a district" deprives the district taxpayers of due process of law.

The theory of taxation is that it supports the public welfare, as that may from time to time and from place to place, be conceived to be. It is usually assumed that the tax levy meets minimal constitutional safeguards against discrimination if the people who pay the tax are treated alike, and the same approximate standard of extraction is followed based, for example, on the amount of income a man receives, or the value of real property he owns in the tax district.

These standards of extraction may not be exactly just or perfectly fair, but they must be put up with. That one man may in the general interest get more benefits from public tax money than another, has never been regarded as a good reason why the other should not pay his share of the tax. The general services of the State are not bought, item by item, merely by those who use them. Public services are thought to be generally important enough to be provided by the whole community for those who need them.

People without children pay for schools; men and women who go through life without litigation must support the courts; people help pay for roads they never use and never see; families in sound mental health help sustain the hospitals for the mentally ill; residents of Kings help acquire and preserve the remote forest lands of Hamilton.

It is one of the concomitant local inequities of the modern state that well-off geographical sections are likely to spend more than they ever hope to get back in carrying along the general burden; and that economically strong areas help sustain the weak ones. This is true within the Federal Union; within the State of New York; within cities, within counties; and within central school districts.

But a local inequity is not necessarily a general injustice and while the individual petitioners make out an appealing case of carrying more than they think warranted of the burden, placed alongside the benefits of the new district, they do not make out a case of constitutional discrimination for which a law court is able to afford redress.

Besides these broad constitutional arguments penetrating into the area of political economy, the individual tax-

payers pursue a more conventional form of constitutional attack upon the statute under which the Commissioner acted in making his order laying out the proposed district. It is contended that Education Law, §1801, is unconstitutional in the sense "it fails to specify standards adequate to guide the Commissioner in laying out central school districts" and is therefore invalid.

The only specifically prescribed statutory duty of the Commissioner in laying out a central district is that he "shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school". (Section 1801, subd. 2). One aspect of the constitutionality of this statute, that it was an invalid delegation of legislative power, was answered in a taxpayer's challenge in *Gardner v. Ginther* (232 App. Div. 296; aff'd 257 N. Y. 578) by holding the power to be administrative and not legislative; a view reiterated in *Matter of Bethlehem Union Free School v. Wilson* (303 N. Y. 107, 114-115).

In truly "administrative" acts, if the administrator follows the form of the statute which lays down his powers, "standards" are irrelevant and not a subject of interest or concern to the court. How many policemen are assigned to a street intersection; whether a street is to be cleaned Monday or Friday; whether a road is to be constructed here rather than there, whether traffic is to be routed one way and not another, are not matters that need prescriptive "standards" found in a law to be properly confided to a public agency; they are matters that need judgment and may be granted to the administrator in broad terms.

The "standards" that the courts hold are to "guide" the administrator, aside from legislative delegation, are standards that he must look to when he undertakes to act in something like the role of the judge, in the "quasi-judicial" area, to decide private rights. In such cases "standards" become valuable guides to the judge on review; and the need for standards is coextensive with the willingness of the court to examine and annul what the administrator has done with the rights of the individual.

It is, perhaps, useful in gaining a perspective of the problem presented by the petitioners to examine illustrations of the boundaries of administrative function and power that have been laid down judicially; and distinctions which have been drawn by the court between different categories of administrative power.

It is a common thing for the court to look at the statutory authority and also at what the administrator has done to see whether he has kept within the frame of his powers.

Good illustrations of this process are to be found in *Matter of Cherry* v. *Board of Regents* (289 N. Y. 148) where the Regents were found to have exceeded the literal statutory grant of power to discipline a dentist; in *Bus Depot Holding Corp.* v. *Valentine* (288 N. Y. 115) where the Police Commissioner was found to have exceeded the grant of power in excluding interstate busses from the streets; and *Matter of Small* v. *Moss* (279 N. Y. 288) where refusal to issue a theatre license because of increased traffic hazard was held beyond the legal frame of power of the licensing officer.

These cases illustrate, not the inadequacy of "standards" of delegation; but the failure to delegate enough and they are essentially cases based on a plain absence of administrative power as the court read the statute. When one turns to quasi-judicial power exercised by an administrator, one sees other needs. Since the administrator acts also as a judge, he must have, as a judge must have, evidence, i.e. "substantial evidence" to sustain him. (*Matter of Kopec* v. *Buffalo Brake Beam, Etc., Iron Wks.*, 304 N. Y. 65).

On still another aspect of administrative law, when the court thinks that there is undue delegation of "legislative power" it will not sanction the administrator's attempting to exercise it (*Matter of Seignious* v. *Rice*, 273 N. Y. 44). An extreme form of restriction on this ground is to be observed in *Matter of Lyons* v. *Prince* (281 N. Y. 557) where a commissioner of buildings was held not to have acted within the frame of his legal power to require certain construction to conform with safety in addition to the words appearing in the statute. A good illustration of what may

be regarded or not regarded as arbitrary when the administrator keeps within the statutory frame is *Matter of Marburg* v. *Cole* (286 N. Y. 202).

To the extent the question of "standards" may be thought to have been left open after *Ginther* and in *Wilson* we are of opinion that the statute is not invalid for a failure of prescription of more detailed standards for the guidance of the administrative action of the Commissioner than those in his broad grant of power in matters of education.

Whether the Commissioner followed the frame of the statutory power given him by the Legislature is quite a different matter; and is not to be confused with the legal concept of invalidity of the statute because of a failure of the Legislature to set up standards in giving that power. The statute here, as it has been noticed, does set up the conditions under which the Commissioner may make an order laying out a central district. He must meet those terms to make a valid order; and at this point the petitioner union school district as a public corporation to which such an issue of law is also available, joins the individual taxpayers in their attack on the order.

If the terms of the statute have not been followed the power of the court to annul is undoubted and is conceded by the Commissioner. The central district, so runs the statute, shall include "only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for" the establishment of such a district (Section 1801).

The attack on the Commissioner's order for failure to follow his statutory authority lies in two branches: (a) that in deciding to lay down the central district he could consider only the conditions written out in the statute and no other conditions; and (b) that the statutory conditions have not been met in the proposed central district.

The first argument is one carried over from quasi-administrative determinations where an administrator decides individual rights within the frame of a statute prescribing those rights. One of the two authorities relied on is *Barry* v.

O'Connell (303 N. Y. 46), a liquor license case; the other is *Picone* v. *Commissioner of Licenses* (241 N. Y. 157), where a junk boat license was denied on two stated grounds neither of which was authorized by statute.

These authorities have no relevancy to the decision of the Commissioner of Education to lay down a central school district. Section 1801 provides the minimum conditions of what a district shall contain as to geographical size and number of pupils. To say that is all there is to it, is grossly to underestimate the responsibility and duty of the Commissioner. He could, and certainly should in the conscientious exercise of his function, take into consideration a wide range of questions of sound administration and good educational policy and practice, standing well above the minimal statutory requirements of size and number.

It seems reasonably clear that the conditions of geographical size and minimum number of pupils are legislative minimal prescriptions without the existence of which the Commissioner would not lay out a central school district; but assuming these bare conditions of size and number to exist, the Commissioner clearly has the duty of considering nevertheless whether it is wise and desirable to make the order for the district and of examining all the complicated and relevant data which may bear on such a decision. To say, as petitioner seems to say, that he is to close his eyes to all beyond convenient size and number of pupils is to do violence to the statute and the Commissioner's powers.

On the second branch of the argument based on a failure of statutory compliance, it is contended that the central district as laid out is not "of suitable size conveniently located". The burden of this argument is that since the central school must be placed in one of the three present districts it will be relatively (depending on where it is located) inconvenient for pupils from the other two to get there.

Essentially this is an argument against the policy of establishing central school districts: "the larger the geographical central school district, the greater the inconvenience of attendance to pupils" (Petitioner's Brief, p. 33).

This is something inherent in the idea of a central district and the statutory words "conveniently located" necessarily are to be read to mean convenience within the scope of the central school concept by keeping in mind that no central school would possibly be quite as convenient as having complete secondary school facilities in each existing district.

It is further argued that convenience is not promoted by including Brookville in the district; but this seems to us to be a question of sound administrative judgment and a question which the Commissioner surely is more competent to decide than the court. We are not able to hold, surely, that his determination is arbitrary in this respect. The additional argument that Brookville, in or out, would not have much effect on the requirement for "a sufficient number of pupils" falls in the same class. The studies accompanying the Commissioner's answer, some of which are attached also as exhibits to the petition, indicate that the order setting up the central district looks to the needs of the future, and even at present ratios Brookville ought to share in the pupil increase projected into 1960-1961.

The answer interposed by the Commissioner in our view is a sufficient pleading. Although petitioners argue that there is no allegation that the Commissioner considered the detailed statistical and fiscal studies and projections attached to the answer in making his determination, his pleading with respect of the most detailed of them is that they were "studies made by the respondent", which means he made them, or as head of the department, had them made for his use, which amounts to the same thing. We are of opinion that the determination of the court at Special Term dismissing this portion of the petition as now consolidated was correct.

Before it becomes effective, an order of the Commissioner laying out a central school district must be followed by certain organizational procedures; and the Special Term has annulled a notice of election and an election in the district held in pursuance of the notice because the court found that one of the essential procedures had not been followed in accordance with the statute.

This proceedural failure was in the sufficiency of the petition asking for the organization of the new district as provided by Section 1802, subd. 1-a, of the statute. Since decision turns on how the statutory language is to be read, it will be useful to quote the pertinent text:

> "1802. 1. New central school districts shall be organized as provided in this subdivision.
>
> a. When an order laying out a central school district has been made and entered as provided in section eighteen hundred one of this chapter, a petition may be presented by persons qualified to vote at school district meetings asking for the organization of a central school district and the establishment of a central school therein. Said petition shall be signed by at least one hundred of such qualified voters or by a number of such qualified voters equal to at least ten per centum of the pupils of said central school district as determined by the last school census, whichever shall be less. If such territory includes one or more cities of less than ten thousand inhabitants or villages having a population of one thousand or more, then such petition shall be signed by at least one hundred of such qualified voters residing within each said city or village, or by a number of such qualified voters residing within each said city or village equal to at least ten per centum of the pupils of the school district residing within said city or village as determined by the last school census, whichever shall be less, and shall also be signed by at least one hundred of such qualified voters residing in said district outside of any city or village or by a number of qualified voters residing in said district outside of any city or village equal to at least ten per centum of the pupils of the school district residing outside of any city or village as determined by the last school census, whichever shall be less."

The district as laid down by the Commissioner which here follows the line of the present Brookville district,

embraces a portion of the Village of Brookville and a portion of the Village of Old Brookville. About one-third of the former and one-tenth of the latter are within the present Brookville district and thus would be within the new central district. There is a dispute about the population, but for the purpose of this proceeding we assume that each of the two villages has a population in excess of 1,000.

If the only test set up in the statute were that fixed by the word "includes" no one would have much difficulty in reading the language to mean an intent to require the special number of signatures only when the proposed district embraced an entire village. That is the plain meaning of the words "includes one or more * * * villages having a population of one thousand or more", read in context with the phrase "such qualified voters residing within such village."

Not any of these words could fairly be construed to mean a portion of a village; they relate to a village in entity. A statute which demands a prescribed inclusion of an entity is not satisfied by an inclusion of something less than the entity prescribed.

The words on which petitioners mainly rely to carry a construction to require the special number of village signatures even though the district does not include the entire village are these: "then such petition shall be signed by at least one hundred of such qualified voters residing within each said * * * village, or by a number of qualified voters residing within each said * * * village equal to at least ten percentum of the pupils of the school district residing within said * * * village."

It is argued that ten per cent of the pupils "of the school district" who are "residing within said * * * village" would not have been used by the Legislature unless it had intended to have the test met in villages that might only partly be included in the district. It is said that if the Legislature had meant that the special number of village signatures are to be required only if the entire village is included in the district, it would have provided, merely, ten

per cent of the pupils residing in the village, and would have found it unnecessary to say "of the school district".

From this it is argued that the Legislature intended to require the special number of village signatures where there is any part of the district within the village, i.e., where any number of pupils "of the school district" reside in the village.

The answer to this argument does not depend merely on the ordinary meaning that is to be attached to the word "includes" as embracing the village in entity; it is to be gathered from other contextual expressions, and to be inferred from the general use of the formula in other parts of the statute.

In the first place it is clear that the "persons qualified to vote" who are entitled to sign this petition are residents of the existing school districts to be embraced in the central district, and no others. The first sentence of subdivision 1-a defines the persons who may sign the petition as those "qualified to vote at school district meetings".

But if the petitioners' reading of the language be followed, any resident of the village qualified to vote in a school district meeting could sign the petition whether he was a resident of the district involved or not; because while the language runs "ten per centum of the pupils of the school district residing within each * * * village" the voters who are counted on this basis of this percentage are not voters "of the school district", but voters "residing within * * * said * * * village". Therefore if this construction be adopted, the number of pupils in the village and also in the district is counted for computing the number of voters needed to sign the petition, but those voters need not be voters of the district as well as of the village, but merely voters of the village.

To take this literally as a consequence of petitioners' argument is to say that when part of a village comes within the proposed district all qualified voters of the village, in or out of the district, are qualified to sign the petition. This is quite manifestly what the Legislature did not intend to to allow, and hence the construction that a whole and not

fragmentary part of a village was intended, which would in any event be made from the word "includes", seems to be given new strength when the alternative suggested by the petitioners' argument is examined carefully.

It will be noticed that the number of voters to be counted on the basis of ten per cent of pupils is not a special formula related to villages. It is an alternative formula which runs through this subdivision, and, indeed, through the section itself, and it has therefore no particular significance in determining whether a whole village or a part was intended by legislative contemplation to come within the word "includes". See, for example, the ten per cent of the pupils "of said central school district" and ten per cent of the pupils "residing outside" any "village" in context in the same subdivision, which seems, additionally, to give further force to an intention to treat the territory within (i. e. not "residing outside") a village in the sense of entity.

Other similar language based on a percentage of pupils relating to voters appears, for example, as part of the alternative formula in subdivision 2-b of the section. Besides all this, the basic provision for signatures in subdivision 1-a, before the alternative based on percentage is set forth, that is, at least one hundred "of such qualified voters residing within" the village, helps make clear the legislative intent to require the specially designated village voters signatures only when the whole village is to be within the central district.

The order of the Special Term should be modified to vacate that part thereof which annuls and sets aside the petition for the election and the election and to deny the petitioners' application in these respects; and as thus modified the order should be affirmed without costs.

APPENDIX C.

Opinion of the Supreme Court of the State of New York, Schirick, J., Decided September 5, 1957.

Two separate proceedings were commenced initially. They have been consolidated upon motion of the petitioners to which the respondent consented. Each proceeding was brought by the Board of Education of School District No. 3, Town of Oyster Bay, Nassau County, as one interested party, and by certain taxpayers of the district, as other interested parties.

The first proceeding is brought pursuant to article 78 of the Civil Practice Act to review and annul the determination of the respondent, the Commissioner of Education of the State of New York, laying out Central School District No. 3 of the Town of Oyster Bay as a central district.

The second proceeding is brought to review and set aside the order of the commissioner calling for an election of the qualified voters of the district to determine whether the organization of such central school district shall be approved.

On April 29, 1957 this court rendered a preliminary decision denying the petitioners' request for a stay of the election without prejudice, however, to the questions raised by the petitioners with reference thereto, but staying all proceedings subsequent to such election pending the determination of the issues herein.

On June 27 this court rendered a second preliminary decision to the effect that no issues of fact were presented which should be tried by a jury.

In the opinion of the court issues of law alone are here presented.

The commissioner's action is based upon the authority granted to him by sections 1801 and 1802 of the Education Law. The constitutionality of such statutory provisions has been sustained by the Court of Appeals (*Matter of Bethlehem Union Free School District* v. *Wilson*, 303 N. Y. 107).

Despite petitioners' arguments to the contrary, this court deems such decision to foreclose further consideration by it of the constitutional question.

Here, as elsewhere in the law, very broad discretionary powers are conferred upon the Commissioner of Education in defining and implementing educational policy. In laying out a central district the commissioner must be satisfied of but three things:

(1) that the area is of suitable size;

(2) that it is conveniently located for the attendance of pupils; and

(3) that it has a sufficient number of pupils.

The studies made by the commissioner furnish ample support for the finding implicit in his determination that the size of the area and the number of pupils therein, present and prospective, are suitable and sufficient. The geography of the area and the means of communication existing therein establish reasonable basis for a finding that it is conveniently located for the attendance of pupils. These determinations were for the commissioner to make. Absent a showing that they are arbitrary or capricious, the court may not interfere. Certainly there is no occasion or justification for substitution of the decision of a jury upon such matters for the discretionary determination of the commissioner.

It is the conclusion of the court that the order of the commissioner in laying out the central school district in question was validly made pursuant to the discretionary powers conferred upon him by law. The first proceeding is accordingly dismissed.

The second proceeding questions the sufficiency of the petition upon which the commissioner directed an election.

Section 1802 (subd. 1, par. [a]) of the Education Law provides as follows:

"1. New central school districts shall be organized as provided in this subdivision.

"a. When an order laying out a central school district has been made and entered as provided in section eighteen hundred one of this chapter, a petition may be presented by persons qualified to vote at school district meetings asking for the organization of a central school district and the establishment of a central school therein. Said petition shall be signed by at least one hundred of such qualified voters or by a number of such qualified voters equal to at least ten per centum of the pupils of said central school district as determined by the last school census, whichever shall be less. If such territory includes one or more cities of less than ten thousand inhabitants or villages having a population of one thousand or more, then such petition shall be signed by at least one hundred of such qualified voters residing within each said city or village, or by a number of such qualified voters residing within each said city or village equal to at least ten per centum of the pupils of the school district residing within said city or village as determined by the last school census, whichever shall be less; and shall also be signed by at least one hundred of such qualified voters residing in said district outside of any city or village or by a number of qualified voters residing in said district outside of any city or village equal to at least ten per centum of the pupils of the school district residing outside of any city or village, as determined by the last school census, whichever shall be less."

It is the contention of the petitioners that pursuant to such statute separate petitions were required to be executed by the requisite number of qualified voters of the villages of Brookville and Old Brookville. It is the position of the respondent that the statute does not require such petitions since (1) not the whole but only a part of such villages is included within the district and (2) neither of such villages had a population of 1000 or more at the time of the last census (General Construction Law, § 37-a).

The latter contention is not open to the respondent in view of the admission in his answer of paragraph 6 of the petition.

The contention that the statute applies only where all of a village is included in a district cannot be accepted. The alternative provision of the statute permitting signatures by a number of qualified voters of the village "equal to at least ten per centum of the pupils of the school district residing within said * * * village" would appear to contemplate a situation where part only of a village is included.

The petitioners are entitled to the relief demanded in the second proceeding.

Submit orders accordingly.

Papers may be obtained at Supreme Court Chambers, Kingston, N. Y.

Decided: September 5, 1957.

Opinion of the Supreme Court of the State of New York, Schirick, J., Decided April 29, 1957.

The petitioners have brought this proceeding pursuant to article 78 of the Civil Practice Act to annul the determination of the respondent, the Commissioner of Education of the State of New York, laying out a central school district and directing an election to determine whether such district should be organized and a central school established therein. Such election is scheduled to be held on May 4. Petitioners contend that the petition upon which the election was ordered does not contain the signatures required by section 1802 (subd. 1, par. a) of the Education Law, and ask that the election be stayed pending the determination of such issue. They urge that if the election is held they will be foreclosed from attacking the sufficiency of the petition, and cite in support of such contention the decision of the Court of Appeals in *Bramley* v. *Miller* (270 N. Y. 307).

An examination of the opinion indicates that petitioners' fears are not well founded. In *Bramley* v. *Miller* (*supra*) the petitioners never raised the issue of the qualifications of one of the signers until after the election had been held. Under such circumstances the court well stated:

> "The provisions of the Education Law were substantially complied with, and the minor defects appearing in the petition calling for the meeting of October 26, 1933, could not and did not affect the legality of that meeting after it had been acquiesced and participated in by the inhabitants of the district without any objection or protest." (p. 312)

In the present case the petitioners have raised the issue prior to the election. By the service of their petition and by their application for a stay they have done all within their power to secure a determination. It is inconceivable that, under such circumstances, they should waive any of their rights by the fact that an election is to be held during the pendency of the proceeding.

The petitioners are entitled to a stay in the form which was in effect in *Matter of Board of Education v. Wilson*, (303 N. Y. 107). Such stay will apply to all proceedings subsequent to the election. A stay of the election itself is denied without prejudice to the questions raised by the petitioners.

Briefs are to be exchanged and all papers submitted within two weeks.

Decided: April 29, 1957.

APPENDIX D.

Order of the Court of Appeals Affirming the Appellate Division.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR..... May 29, 1959.

No. 393.

In the Matter

of

The Applications of the Board of Education of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c.,

Appellants,

For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of James E. Allen, Jr., as Commissioner of Education of the State of New York, &c.,

Respondent.

Be it Remembered, That on the 24th day of December in the year of our Lord one thousand nine hundred and fifty-eight, Board of Education of Union Free School District No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Sprague & Stern, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James E. Allen, Jr., as Commissioner of Education of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Charles A. Brind, Jr., his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Root Stern, Jr., of counsel for the appellants, and by Mr. Charles A. Brind, Jr., of counsel for the respondent, brief filed by *amicus curiae*,

and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, May 29, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

[SEAL]

APPENDIX E.

Order of the Court of Appeals Denying Motion for Reargument But Granting Amendment of the Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of July, A. D. 1959.

Present, Hon. ALBERT CONWAY,
Chief Judge, presiding.

IN THE MATTER *of* The Applications of THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3 of the Town of Oyster Bay, Nassau County, & ors., &c., Appellants, For orders under Article 78 of the Civil Practice Act to review, vacate and set aside the determinations of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, &c., Respondent.	Mo. No. 371

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument be and the same hereby is denied, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that section 1801 of the Education Law was unconstitutional in that it deprived taxpayers of their property without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that said section was constitutional and that appellants' constitutional rights were not violated.

AND the Supreme Court, Albany County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

APPENDIX F.

New York Education Law.

The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

* * * * * *

The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this chapter. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper.

* * * * * *

Nothing herein contained shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. An existing district within the meaning of this article shall be construed to mean a district that lies within the boundaries of a central school district. Each such existing district shall be deemed to continue to exist in law for the purpose of paying all its just debts, including obligations lawfully issued prior to the organization of such central school district, together with all interest thereon as the same shall fall due. In levying the annual school tax upon the property of such central school districts, the board of education shall also assess and levy upon the taxable property of each such existing district which has an outstanding indebtedness, an additional sum sufficient to pay all of such indebtedness which shall fall due during the school year for which the tax is levied less any sum received by such central school district and apportioned and credited to the existing school district pursuant to the provisions of subdivision four of section eighteen hundred six of this article.

* * * * * *

All central school districts shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this chapter except that in each existing district maintaining a school at the time of centralization the central school district shall continue to maintain such school for the instruction of pupils therein up to and including the sixth elementary grade for a period, commencing on the day of centralization, of not less than five years, unless the legal voters of such existing district at a meeting of such voters duly called by the board of education of such central school district shall, by majority vote of those present and voting at such meeting, determine to discontinue the school in such existing district prior to the expiration of such minimum five year period and in such case the school shall be discontinued accordingly. At any time after the expiration of such minimum five year period the board

of education of the central school district may, by a majority vote of the members thereof, discontinue such school in such existing district, provided, however, that in the event the legal voters of such existing district shall have determined not to discontinue such school at a meeting of such voters duly called upon such question, the board of education of the central school district may not discontinue such school until after the expiration of a period of five years following such determination by such legal voters. The district officers of the several existing districts shall remain in office until August first next following organization of such central school district for the purpose of conducting and maintaining school in the several districts, the carrying out of contracts in force at the time of the organization of such central school district, of paying all just debts and obligations of such existing districts due and payable on or prior to said August first, and of levying and collecting taxes raised or necessary to be raised for any of said purposes. For the purposes of the apportionment and payment of public moneys, notwithstanding any other provisions of this article, any apportionments and payments made during the school year in which such central school district was organized shall be apportioned and credited to the existing districts. Any apportionments made and paid during the school year next succeeding the date of the organization of such central school district shall be made and credited to the central school district but the amounts thereof shall be determined upon the basis of the continuance of the existing districts as separate districts during the entire school year in which such central school district was organized.

* * * * * *

N. Y. Civil Practice Act.

Answer. At least two days prior to the return day, unless a different time is fixed in the order to show cause, the respondent shall serve upon the petitioner, and file with the clerk of the court, a verified answer. The answer must contain proper denials and statements of new matter, as

in an action, and must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of; but it may not contain a counterclaim. The respondent shall annex to the answer [1]*filed with the clerk of the court*[1] a certified transcript of the record of proceedings subject to review or consideration. [2]*Where more than one proceeding is brought to review the same determination, the filing of one certified transcript of the record shall be sufficient. The respondent*[2] shall also serve and submit with the answer affidavits, made by a person having knowledge of the facts, or other written proof, showing such evidentiary facts as shall entitle him to a trial of any issue of fact.

Where the proceeding is brought to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction in favor of another party, the latter may serve and file a separate answer, or unite with the body or officer in an answer, or annex to the body's or officer's answer an instrument in writing, subscribed by him, to the effect that he adopts it and relies upon the matters therein contained as sufficient cause why the body or officer should not be restrained; in which case, the party shall thenceforth be deemed the sole respondent in the proceeding; except that a final order in favor of the petitioner must be directed against both the body or officer and the party.